



1 Thomas Circle, Suite 900
Washington, DC 20005
main: 202-296-8800
fax: 202-296-8822
www.environmentalintegrity.org

September 23, 2012

Ignacia S. Moreno
Assistant Attorney General
U.S. DOJ—ENRD
P.O. Box 7611,
Washington, DC 20044-7611

RE: United States of America; Commonwealth of Pennsylvania; City of Philadelphia; State of Oklahoma; and State of Ohio v. Sunoco, Inc., Civil Action 05-2866, Department of Justice NO. 90-5-2-1-1774/1

Dear Ignacia S. Moreno,

The Environmental Integrity Project and Clean Air Council respectfully submit the following comments on the proposed Fourth Amendment to the Sunoco Consent Decree. The proposed amendment would allow the Philadelphia Refinery to circumvent Clean Air Act New Source Review permitting requirements that are critical to preserving and improving air quality. We understand that the Philadelphia Refinery employs hundreds of skilled workers in the region, and support efforts to keep the plant open. But, this can be accomplished without violating key provisions of the Clean Air Act in ways that would expose the City of Philadelphia to much higher levels of air pollution.

The proposed amendment would allow the Philadelphia Refinery to “offset” significant emission increases that result from the construction or modification of its production units by using “credits” generated from the retirement of Sunoco’s Marcus Hook Refinery. These credits effectively authorize the Philadelphia Refinery to increase emissions of fine particles, nitrogen oxide and other pollutants in an area that already fails to meet federal air quality standards designed to protect the public’s health. Because the emission-trading scheme authorized by the proposed amendment violates the clear requirements of the Clean Air Act, we respectfully request that it be withdrawn.

I. Statement of Relevant Facts

A. The Proposed Fourth Amendment to the Sunoco Consent Decree

EPA entered into a consent decree with Sunoco for alleged violations of EPA’s New Source Review requirements at several facilities in 2005, including both the Philadelphia and Marcus Hook Refineries.¹ EPA’s proposed Fourth Amendment to the Consent Decree would enable the Philadelphia Refinery to avoid New Source Review requirements in the future by receiving credits for emission reductions that result from the shutdown of the Marcus Hook Refinery.² More specifically, the amendment would

¹ Sunoco Consent Decree, at 2 (as numbered in the printed document), <http://www.epa.gov/compliance/resources/decrees/civil/caa/sunoco-cd.pdf>.

² Proposed Fourth Amendment to the Sunoco Consent Decree, at ¶6, <http://www.epa.gov/compliance/resources/decrees/amended/fourthamendedsunoco-cd.pdf>.

authorize the Philadelphia Refinery to increase emissions that result from construction or modification at its plant without obtaining a New Source Review permit by the following amounts:

Nitrogen Oxide: 111 tons per year;
Sulfur Dioxide: 128 tons per year;
Fine Particles (PM 2.5): 317 tons per year;
PM 10: 317 tons per year;
Carbon Monoxide: 365 tons;
Volatile Organic Compounds: 2.2 tons per year;
Sulfuric Acid Mist: 56.07 tons per year; and
Greenhouse Gases: 992,286 tons per year.³

To use these credits 1) the proposed modifications must satisfy the emission limits listed in the amendment and, 2) the credits must be generated while the Philadelphia and Marcus Hook Refineries constitute one stationary source.⁴

The Pennsylvania Department of Environmental Protection (PADEP), by administrative amendment, has already rewritten the Marcus Hook title V Permit to satisfy the second of the two requirements.⁵ According to the State, the Marcus Hook and the Philadelphia Refineries are a single facility. Because of PADEP's decision to make this change via administrative amendment, the administrative transformation of two facilities into one was not subject to public review and comment.⁶

B. The Philadelphia Refinery

The Philadelphia Refinery is located in Philadelphia County, a nonattainment area for several pollutants including fine particles (which are airborne particles that have a diameter that is less than 2.5 microns) and ozone.⁷ Emissions of nitrogen oxides (NOx) contribute to ozone, while emissions of fine particles, NOx, sulfur dioxide, and sulfuric acid mist all contribute to fine particle concentrations in the ambient air.⁸

Table 1: Philadelphia County Nonattainment Pollutants⁹

Pollutant	Standard	Status
Ozone	2008 8-hour Ozone Standard: 0.075 PPM	Nonattainment
	1997 8-hour Ozone Standard: 0.08 PPM	Moderate Nonattainment
Particulate Matter	2006 PM 2.5 24-hour Standard:	Nonattainment

³ *Id.*

⁴ *Id.*

⁵ 42 Pa. Bull. 5535–5612 (Aug. 25, 2012).

⁶ 127 PA. Code § 127.450.

⁷ See Table 1.

⁸ EPA, August 2005 Report, Evaluating Ozone Control Programs in the Eastern United States: Focus on the NOx Budget Training Program, 2004, at ii (“EPA has developed more than a dozen programs since 1990 to limit ozone formation by reducing emissions of its precursor[]: nitrogen oxides”).

⁹ EPA, The Green Book Nonattainment Areas for Criteria Pollutants, Jul. 20, 2012, <http://www.epa.gov/airquality/greenbook/> (listing nonattainment zones for each criteria pollutant).

	35µg/m ³	
	2006 PM 2.5 Annual Standard: 15µg/m ³	Nonattainment
	1997 PM 2.5 24-hour Standard: 65µg/m ³	Nonattainment
	1997 PM 2.5 Annual Standard: 15µg/m ³	Nonattainment
Carbon Monoxide	1971 CO 8-hour Standard: 9ppm	Partial County Maintenance
	1971 CO 1-hour Standard: 8ppm	Partial County Maintenance

The Philadelphia Refinery sits 17 miles away from the Marcus Hook Refinery.¹⁰ In addition to their physical distance, the two refineries have operated separately in name and practice. For example, in Sunoco's 2011 Annual Report to shareholders, the two refineries are referred to repeatedly as distinct facilities.¹¹ Practically, Sunoco has treated the two refineries as distinct entities for regulatory purposes as well:

- Sunoco has held separate operating permits for both refineries.¹²
- Sunoco has consistently assessed New Source Review applicability for both sites independently.¹³
- Sunoco has reported each refinery's emissions to EPA, PADEP, and AMS separately.¹⁴
- Sunoco has reported the output of each facility to the Energy Information Agency separately.¹⁵

The only connection between the two facilities is a vestigial pipeline that used to transport materials between the two refineries.¹⁶ It is no longer in use.¹⁷ Sunoco's permanent shut down of the Marcus Hook facility in 2011 makes this plain.¹⁸ Finally, Sunoco is selling 2/3 of its stake in the Philadelphia Refinery to the Carlyle Group, and it is unclear what type of operational control, if any, Sunoco will retain.¹⁹ At the same time, Sunoco retain complete ownership of the Marcus Hook Refinery.²⁰

¹⁰ Memorandum from George A. Eckert, Facility Permitting Section, Air Quality, PADEP, to James D. Rebarchak, Regional Manager, Air Quality, at 3 (Jul. 26, 2012).

¹¹ Sunoco Inc., 2011 Annual Report and Form 10-K, 6, 34, 42 (2012), <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NDU5NDkyfENoaWxkSUQ9NDg3MjQ2fFR5cGU9MQ==&t=1>.

¹² Sunoco, Request for State Only/Title V Operation Permit Administrative Amendment, (requesting the PADEP and the City of Philadelphia to transfer emissions sources authorized by the Marcus Hook Refinery Title V permit to the Philadelphia Refinery Title V permit).

¹³ See e.g. 36 Pa. Bull. 6419 (Oct. 21, 2006) (authorizing the Philadelphia Refinery to amend its operating permit to increase capacity and emissions without considering the impacts of the project at the Marcus Hook Refinery).

¹⁴ EPA's toxic release inventory includes separate entries for both refineries. Similarly, PADEP and AMS maintain separate emission inventories for each facility.

¹⁵ See ENERGY INFORMATION AGENCY, REFINERY CAPACITY REPORT, <http://www.eia.gov/petroleum/refinerycapacity/> (Reports are available from 1994-2012).

¹⁶ Sunoco, Request for State Only/Title V Operation Permit Administrative Amendment (describing the pipeline between the two facilities and how it was previously used).

¹⁷ See *Id.* ("[S]ince oil refining operations at Marcus Hook have ceased, the Philadelphia [sic] has had to alter its sourcing of many feedstocks and intermediates").

¹⁸ Proposed Fourth Amendment to the Sunoco Consent Decree, at ¶2.

II. Statement of Law

A. *The Clean Air Act and New Source Review*

Congress passed the Clean Air Act with the purpose of reducing air pollution to levels that are safe for human health and the environment.²¹ Pursuant to EPA's Clean Air Act authority, the Agency has set National Ambient Air Quality Standards (NAAQS) at levels that are safe for human health and the environment with an adequate margin of safety.²² Areas that satisfy these levels are classified as attainment areas.²³ Those that do not are nonattainment areas.²⁴

The Clean Air Act's New Source Review is bifurcated; aiming to maintain air quality in attainment areas and improve air quality in nonattainment areas.²⁵ In both attainment and nonattainment areas, a facility must obtain a New Source Review permit for any new construction or modification of existing units that would result in a significant increase of certain pollutants.²⁶ In nonattainment areas, a facility subject to New Source Review must comply with the Lowest Achievable Emission Rate (LAER) standards, which limit emissions to the lowest levels required in any state implementation plan or achieved by a similar facility in practice.²⁷ In addition, the facility must offset any increase in emissions that will remain *after* compliance with LAER emission limits.²⁸ Because Philadelphia is in nonattainment for both ozone and fine particles, any construction or modification that would significantly increase emissions of NO_x or fine particles must meet the LAER requirements.

In attainment areas, facilities subject to New Source Review must meet emission limits based on the Best Available Control Technology (BACT),²⁹ which are based on the highest achievable emission control taking into consideration energy, environmental, and economic impacts.³⁰ Facilities in Philadelphia are subject to these BACT limits for significant increases in sulfuric acid, carbon monoxide, sulfur dioxide, and greenhouse gases.

Whether LAER or BACT applies, New Source Review also requires that the public be given the opportunity to comment on and contest a proposed permit.³¹ The permitting authority must also demonstrate the impact of any proposed emission increases on local air quality.³²

¹⁹ Andrew Maykuth, *Deal to Save Sunoco Refinery Took Hard Work Behind the Scenes*, THE INQUIRER, Jul. 5, 2012, http://articles.philly.com/2012-07-05/news/32537677_1_philadelphia-refinery-refinery-workers-sunoco

²⁰ *Id.*

²¹ 42 U.S.C. § 7401(d).

²² 42 U.S.C. § 7409(b)(1).

²³ *Id.* at § 7407(d).

²⁴ *Id.*

²⁵ *Id.* at §§ 7470–7479, 7501–7515.

²⁶ 42 U.S.C. §§ 7475, 7503.

²⁷ EPA, New Source Review Workshop Manual Draft, at G.2 (1990), <http://www.epa.gov/ttn/nsr/gen/wkshpman.pdf>.

²⁸ 42 U.S.C. § 7503.

²⁹ *Id.* at § 7475(a)(4).

³⁰ 42 U.S.C. § 7479(c).

³¹ See 40 C.F.R. § 52.21(q); 40 C.F.R. § 124.10.

³² 42 U.S.C. §§ 7475, 7503.

B. Definition of “Facility”

Applicability determinations for New Source Review must be conducted separately for each stationary source. Within each stationary source, the law allows an emission increase from one or more units to be offset by contemporaneous decreases from other units at the same stationary source.³³ EPA regulations define a stationary source as “any building, structure, facility, or installation which emits or may emit a regulated [New Source Review] pollutant.”³⁴ Building, structure, facility, or installation is defined as:

all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous adjacent properties, and are under the control of the same person (or persons under common control). . .³⁵

As explained further below, the Philadelphia and Marcus Hook Refineries do not meet the test of a single facility, so emission reductions resulting from closure of Marcus Hook cannot be used to offset increases at the Philadelphia Refinery.

C. Standard of Review

While EPA has wide discretion in how it resolves claims brought under the Clean Air Act, federal courts have said that the resulting agreement must A) comply with the law, B) further the purpose of the Clean Air Act, and C) be negotiated at arms-length.³⁶ As explained further below, the Fourth Amendment fails to meet that standard because:

- A) It authorizes emission increases that would otherwise be subject to New Source Review by treating two separate facilities, 17 miles apart, as one, based on a faulty analysis of “facility” that violates the Clean Air Act and EPA’s own regulations and policies;
- B) The emission control requirements that would apply to the Philadelphia Refinery under the proposed amendment do not meet New Source Review, BACT or LAER standards that would otherwise apply to the Philadelphia Refinery;
- C) The relief afforded to the Philadelphia Refinery appears to be contingent on a state permitting decision that has already been made, and was not subject to public review and comment; and
- D) It is unclear that EPA’s decision was made at arm’s length, given the apparent White House interest in the outcome.

³³ 40 C.F.R. § 42.21(b)(3).

³⁴ 40 C.F.R. § 42.21(b)(5).

³⁵ 40 C.F.R. § 42.21(b)(6).

³⁶ *U.S. v. BP Exploration & Oil Co.*, 167 F.Supp.2d 1045, 1049 (N.D. Ind. 2001) (citing *United States v. Union Elec. Co.*, 132 F.3d 422, 430 (8th Cir.1997); *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1435 (6th Cir.1991); *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir.1990); *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir.1980)).

III. The Proposed Amendment to the Sunoco Consent Decree Must be Withdrawn Because it Does Not Comply with the Letter or Purpose of the Clean Air Act

A. The Proposed Amendment Would Impermissibly Allow the Philadelphia and Marcus Hook Refineries to be Permitted as a Single “Facility.”

The Philadelphia Refinery and Marcus Hook Refinery are not one “facility.” First, they are not under common control and are not on contiguous properties or “adjacent” to each other. Second, Sunoco’s treatment of the refineries as separate facilities benefited the company in prior New Source Review permit proceedings, reversing course now is contrary to EPA’s longstanding policy and fundamentally unfair. The decision to redefine both refineries as one source comes after the company’s plan to close Marcus Hook was a matter of public knowledge.³⁷ Furthermore, EPA’s inclusion of the provision in the proposed amendment has provided the state’s illegal single source determination a federal stamp of approval and this comment period may be the only forum to challenge this action. For these reasons, allowing the Philadelphia Refinery to circumvent NSR review by considering both refineries to be one “facility” would violate the Clean Air Act and is impermissible under long-standing and broadly accepted judicial precedent.

1. The Philadelphia and Marcus Hook Refineries Are Not One “Facility” Because They Are Not Under Common Control or “Adjacent” to One Another

Two refineries may be considered as a single “facility” under the Clean Air Act if they share the same SIC code, are under common control or ownership, and are on contiguous or adjacent properties.³⁸ The Philadelphia and Marcus Hook Refinery do not satisfy these criteria because a) they are not under common control, and b) they are not on contiguous or adjacent properties.

a) The Marcus Hook Refinery is Owned and Operated by Sunoco; While the Philadelphia Refinery Will be Owned and Operated by Philadelphia Energy Solutions Refining and Marketing.

The Philadelphia Refinery and Marcus Hook Refinery will no longer be under common control. Two facilities are under common control if one entity has “the power to manage the pollutant emitting activities of the facilities at issue, including the power to make or veto decisions to implement major emission-control measures or to influence production levels or compliance with environmental regulations.”³⁹ In a 1979 memorandum, EPA indicated that “control” of a facility required at least a 10% voting interest or the power to make or veto decisions.⁴⁰ In this case, it is unclear what, if any, voting rights Sunoco will retain.⁴¹ Newspaper reports indicate that Sunoco will not retain control of the

³⁷ Sunoco Inc., 2011 Annual Report and Form 10-K, 14 (2012), available at: <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NDU5NDkyfENoaWxkSUQ9NDg3MjQ2fFR5cGU9MQ==&t=1>.

³⁸ 40 C.F.R. § 52.21(b)(6); 25 Pa. Code § 121.1.

³⁹ Letter from Robert B. Miller, Chief, Permits and Grants Section, U.S. EPA Region 5, to William Baumann, Chief, Combustion and Forest Products Section, Wisconsin Department of Natural Resources (Aug. 25 1999).

⁴⁰ Memorandum from Edward E. Reich, Director, Division of Stationary Enforcement, U.S. EPA, to Diana Dutton, Director, Enforcement Division, U.S. EPA Region 6 (Mar. 16, 1979).

⁴¹ Andrew Maykuth, *Deal to Save Sunoco Refinery Took Hard Work Behind the Scenes*, THE INQUIRER, at 2, Jul. 5, 2012, http://articles.philly.com/2012-07-05/news/32537677_1_philadelphia-refinery-refinery-workers-sunoco.

refinery.⁴² As a result, the Marcus Hook Refinery will continue to be under the control of Sunoco and the Philadelphia Refinery will be transferred to Philadelphia Energy Solutions Refining and Marketing, (PES R&M) which Sunoco only has a minority stake in. Therefore, the two facilities are not under common control and ownership.

b) The Philadelphia and Marcus Hook Refinery are Not “Adjacent” to One Another Because They are 17 Miles Apart and Do Not Have a Unique or Dedicated Interdependent Relationship With One Another.

The Philadelphia and Marcus Hook Refineries do not qualify as “adjacent” emission sources under EPA’s common sense test. “[D]etermining whether facilities are contiguous or adjacent depends not only on the physical distance between them but [also] on the type of nexus (relationship) between the facilities.”⁴³ For facilities that are far apart to be deemed a single facility, they must have a “unique or dedicated interdependent relationship.”⁴⁴ EPA has determined that facilities separated by just 4.5 miles must demonstrate such a relationship to be considered as a single source.⁴⁵ In this case, the refineries are 17 miles apart.

The fact that there is a pipeline between the two facilities does not demonstrate a unique or interdependent relationship, especially because it is no longer used. An unnecessary physical connection, like a pipeline, is not sufficient to show that two facilities have a “unique or dedicated interdependent relationship.”⁴⁶ EPA addressed a similar issue in a letter to BP: EPA found that despite physical connections between the two plants, they were not sufficiently interdependent because both facilities could continue to operate without the other.⁴⁷ Here, the pipeline is vestigial, and the Philadelphia Refinery will operate independently of the Marcus Hook facility. This is not a case where the two refineries rely on one another a majority, or even some of the time, a characteristic EPA has required when two emissions sources are located this far apart.⁴⁸ This is evidenced by the fact that the Philadelphia Refinery was operated by a separate company until 1989, and will continue to do so now that the Marcus Hook Refinery is shut down.⁴⁹

⁴² *Id.* (“Carlyle, for an undisclosed investment in the refinery operations, gets control of [the Philadelphia Refinery]”).

⁴³ Letter from Kathleen Cox, Office of Permits & Air Toxics, Air Protection Division, U.S. EPA Region 3, to Troy D. Breathwaite, Air Permits Manager, Virginia Department of Environmental Quality, Tidewater Regional Office (Jan. 10 2012) (quoting Letter from Kathleen Henry, Chief, Permits and Technical Assessment Branch, U.S. EPA Region 3, to John Slade, Chief, Division of Permits, PADEP (Jan. 15, 1999).

⁴⁴ Letter from Callie A. Videtich, Director, Air Program, U.S. EPA Region 8, to John D. Lowe, Deputy Florida Operations Manager, BP America Production Company (Oct. 18, 2010).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Memorandum from Robert G. Kellam, Acting Director, Information Transfer & Program Integration Division, U.S. EPA OAQPS, to Richard R. Long, Director, Air Program, U.S. EPA Region (Aug. 27, 1996) (EPA deemed a brewery and a farm, separated by six miles, to be a single source because the brewery *could not* operate without the farm).

⁴⁹ See ENERGY INFORMATION AGENCY, GENEALOGY OF MAJOR U.S. REFINERS (2009), http://www.eia.gov/emeu/finance/mergers/summary_d.html. Cf. Sunoco, Request for State Only/Title V Operation Permit Administrative Amendment, Att. 1 at 3 note 10 (Sunoco’s memo supporting their request to aggregate the Marcus Hook and Philadelphia Refineries states that the two refineries were built by different entities and at different periods and that operating them in concert was not a concern of the original owners’ or Sunoco’s).

Even if the two facilities were once “adjacent” as defined in the Clean Air Act, EPA has made clear that past interactions between the two refineries cannot be used to justify a finding that they are adjacent today. In making a determination of whether two facilities are adjacent, one must consider the present relations between the emission sources.⁵⁰ EPA has stressed that there is a difference between what a facility “can do and what it actually does.”⁵¹ In other words, even if two facilities have the option of operating co-dependently, they cannot be treated as a single facility unless they actually operate accordingly.⁵² As explained above, the Marcus Hook Refinery was slated to be shutdown since 2011. As a mothballed facility, the Marcus Hook Refinery cannot have a continuing relationship with the Philadelphia Refinery that is relevant for the purposes of an adjacency determination. Therefore, the two facilities are not “adjacent” to one another, and EPA cannot allow the Philadelphia Refinery to utilize the emission credits generated by Marcus Hook in future NSR permit proceedings.

2. Defining the Marcus Hook and Philadelphia Refineries as a Single “Facility” is Contrary to EPA Policy and is Fundamentally Unfair

Sunoco cannot flip-flop between treating the Philadelphia and Marcus Hook Refineries as multiple facilities and as a single facility based on regulatory convenience. EPA has consistently stated that once an owner or operator decides to treat multiple emissions sources as a single facility or, alternatively as multiple facilities, it does not have the discretion to reverse course at a later date.⁵³ The Philadelphia Refinery and the Marcus Hook Refinery have always been treated independently. For example, the two facilities had separate title V permits.⁵⁴ Also, the two facilities applied for minor modification amendments independently.⁵⁵ As a result, Sunoco could implement minor modifications without taking into account potential increases at the other facility. Effectively, this gave each facility its own emissions cushion to deplete before it would triggering New Source Review permitting requirements. It would be fundamentally unfair to allow the facilities to reverse course now, when it stands to benefit from aggregating the refineries. A letter from EPA to Shell, in response to the company’s request for a single source determination highlighted this concern: “Although this decision may benefit the source in this instance, future increases in both locations must be aggregated for the purposes of determining [New Source Review] applicability.”⁵⁶ The letter went on to say that a facility could only switch its single source status is if the “conditions of common management and physical interdependence are drastically altered.”⁵⁷ While the conditions at the Philadelphia Refinery are altering; the Marcus Hook Refinery is

⁵⁰ Letter from JoAnn Heiman, Chief, Air Permitting and Compliance Branch, U.S. EPA Region 7, to James Pray, Brown, Winick, Graves, Gross, Baskerville, and Schoenebaum, P.L.C. (Dec. 6, 2004).

⁵¹ *Id.*

⁵² *Id.*

⁵³ Letter from Edward E. Reich, Director, Division of Stationary Source Enforcement, U.S. EPA, to Clyde B. Eller, Director, Enforcement Division, U.S. EPA Region 9 (May 16, 1980) [hereinafter 1980 Shell Letter]; Richard Long, Director, Air Program, U.S. EPA Region 6, to Lynn Menlove, Manager, New Source Review Section, Utah Division of Air Quality (May 21, 1998).

⁵⁴ See Memorandum from James D. Rebarachak, Regional Manager, Air Quality, PADEP, to George A. Eckert, Facility Permitting Section, Air Quality, PADEP (Jul. 26, 2012) (interoffice memo recommending the consolidation of the previously separate title V permits for the Marcus Hook Refinery and the Philadelphia Refinery).

⁵⁵ See e.g. 36 Pa. Bull. 6419 (Oct. 21, 2006) (authorizing the Philadelphia Refinery to amend its operating permit to increase capacity and emissions without considering the impacts of the project at the Marcus Hook Refinery).

⁵⁶ 1980 Shell Letter, *supra* note 52.

⁵⁷ *Id.*

shut down and Sunoco has sold 2/3 of the Philadelphia Refinery, these changes are the opposite of what would be necessary support a single source determination.

B. The Proposed Amendment Will Harm Air Quality by Allowing the Philadelphia Refinery to Avoid NSR Requirements

The proposed amendment should be withdrawn because it will negatively impact air quality by allowing the Philadelphia Refinery to significantly increase emissions without complying with New Source Review. A consent decree brought under the Clean Air Act cannot undermine the goals of the law giving rise to the original claims that are the basis for the settlement.⁵⁸ The primary purpose of the Clean Air Act and New Source Review is to reduce pollution through consistent and fair application of emission control requirements.⁵⁹ As discussed above, New Source Review furthers these ends by requiring facilities that significantly increase their emissions to mitigate the impact by complying with technology-based standards.⁶⁰ The Consent Decree undermines these goals by allowing the Philadelphia Refinery to increase emissions beyond the New Source Review significance thresholds by discounting pollution increases with reductions realized at a separate facility 17 miles away.

While the proposed amendment does limit the use of emission credits to projects and equipment that will reduce emissions, these are not always as stringent as BACT or LAER. For example, condition 99A.a.iv. would require the Philadelphia Refinery to meet a NO_x limit of 20 ppmvd, corrected to 0% O₂, on a 365-day rolling average at fluidized catalytic crackers (FCCUs).⁶¹ But EPA's recent consent decree with BP requires the Whiting, Indiana refinery to meet a lower 10 ppmvd NO_x limit (also based on a 365-day rolling average and corrected to 0% O₂) while also meeting a short term 7-day rolling average at 40 ppmvd.⁶² As noted previously, significant increases of NO_x in the Philadelphia region cannot be authorized unless they meet LAER requirements, which would require the Philadelphia Refinery to at least meet the lower NO_x standards that are already by EPA's consent decree with BP, unless it could demonstrate that to do so would result in the closure of the plant. No such demonstration has been made.

Table 1: Comparison of Selected Limits in the BP Whiting Consent Decree and the Proposed Amendment to the Sunoco Consent Decree⁶³

Unit	BP Whiting Consent Decree	Proposed Fourth Amendment
FCCU	Short-term NO _x : 40 ppmvd	None
	Long-term NO _x : 10 ppmvd	Long-term NO _x : 20 ppmvd
	Short-term SO ₂ : 50 ppmvd	None
	Long-term SO ₂ : 10 ppmvd	Long-term SO ₂ : 25 ppmvd
	PM (condensable+filterable): 1.2	None

⁵⁸ *U.S. v. BP Exploration & Oil Co.*, 167 F.Supp.2d 1045, 1049 (N.D. Ind. 2001) (citing *United States v. Union Elec. Co.*, 132 F.3d 422, 430 (8th Cir.1997)).

⁵⁹ 42 U.S.C. § 7470(5).

⁶⁰ See *supra* II.A.

⁶¹ Proposed Fourth Amendment to the Sunoco Consent Decree, at ¶6, <http://www.epa.gov/compliance/resources/decrees/amended/fourthamendedsunoco-cd.pdf>.

⁶² BP Products North America Consent Decree, at V.A., <http://www.epa.gov/compliance/resources/decrees/civil/caa/whiting-cd.pdf>.

⁶³ Proposed Fourth Amendment to the Sunoco Consent Decree, at ¶6, <http://www.epa.gov/compliance/resources/decrees/amended/fourthamendedsunoco-cd.pdf>; BP Products North America Consent Decree, at V.A., <http://www.epa.gov/compliance/resources/decrees/civil/caa/whiting-cd.pdf>.

	pounds per 1000 pounds of coke burn	
Flares	Refinery Wide Cap (controls NO _x , SO ₂ , VOCs, and GHGs)	None
	Fuel Gas Recovery Requirement (control NO _x , SO ₂ , VOCs, and GHGs)	None
	Flare Instrumentation to Assure Maximum Combustion Efficiency (controls VOCs and GHGs)	None

Also, for any NO_x increase over 40 tons that remains after complying with LAER, the Philadelphia Refinery would have to offset emissions by purchasing emission reduction credits from other facilities. The Amended Consent Decree would effectively eliminate such requirements for any emission increases up to the offset amounts identified in the proposed amendment (e.g., 317 tons of fine particles, and 111 tons of nitrogen oxide). Nor does the Consent Decree require the Philadelphia Refinery or the state to model the impact of emission increases (up to the allowable offset amounts), as required by New Source Review.

C. The Proposed Amendment Was Not Negotiated at Arms-Length

“A consent decree must be both procedurally and substantively fair. Procedural fairness concerns the negotiation process, i.e., whether it was open and at arms-length.”⁶⁴ In this case, there is some evidence that the modified Consent Decree was not negotiated at arms-length. Specifically, several newspaper articles report that the Obama Administration renegotiated Clean Air Act requirements to convince the Carlyle group to purchase a majority stake in the refinery and keep it running.⁶⁵ While concern for potential loss of jobs is understandable, it does not provide a sufficient legal basis for overriding the requirements of the Clean Air Act. The decision to allow two disparate facilities 17 miles apart to be treated as one sets a significant precedent that is likely to fuel further demands for aggregation to avoid New Source Review emission control standards.

⁶⁴ *BP Exploration & Oil Co.*, 167 F.Supp.2d at 1052 (internal citations omitted). See also *Akzo Coatings of Am., Inc.*, 949 F.2d at 1435; *U.S. v. Chevron*, 380 F.Supp. 1104, 1111 (N.D. Cal. 2005).

⁶⁵ *Refining: Obama Admin Pushed Private Equity Firm to Save Pa. Plant as Campaign Slammed Romney for Bain Position*, ENERGY WIRE, Aug. 23, 2012, <http://www.eenews.net/energywire/2012/08/23/archive/10?terms=Sunoco> (“To sweeten the deal . . . the Obama administration and state regulators said they would loosen some environmental restrictions on the refinery.”); Carrie Lukas, *A Refinery Rescue Reconsidered*, PHILADELPHIA INQUIRER, Sept. 14, 2012, http://articles.philly.com/2012-09-14/news/33845189_1_oil-refinery-sunoco-refinery-fuel-and-petrochemical-manufacturers (“This particular oil refinery, in a battleground state, was considered politically important so the White House brokered a deal . . . Onerous state and federal environmental regulations were . . . renegotiated for the plant. Pollution credits from the closed Sunoco refinery nearby were allowed to be transferred to the Philadelphia facility. These were important enticements to Carlyle); Andrew Maykuth, *Deal to Save Sunoco Refinery Took Hard Work Behind the Scenes*, THE INQUIRER, at 2, Jul. 5, 2012, http://articles.philly.com/2012-07-05/news/32537677_1_philadelphia-refinery-refinery-workers-sunoco (“[Carlyle] was able to receive some sweeteners that might not have been available to Sunoco alone . . . Federal and state officials agreed to modify the consent order to relax emission limits for several years to allow the refinery to install new equipment”).

IV. Conclusion

The Environmental Integrity Project and Clean Air Council appreciate this opportunity to comment on the proposed amendments to the Sunoco Consent Decree. As discussed above, the proposed paragraph 99A violates the letter and purpose of the Clean Air Act and should not be included in the amendment. If you have any questions or would like further clarifications about our concerns, please contact Sparsh Khandeshi at the contact information provided below.

Sincerely,

/s/ Sparsh Khandeshi

Sparsh Khandeshi
Attorney,
Environmental Integrity Project
skhandeshi@environmentalintgerty.org
202-263-4446